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No. 69

In the Supreme Court of the United States

OCTOBER TERM, 1930

ANNETTE AIKEN, ADMINISTRATRIX OF THE ESTATE OF FRIEND M. AIKEN, DECEASED, PETITIONER

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Preliminary discussion	6
Summary of argument	7
Argument	8
Conclusion	12
Appendix (statutes involved)	13–16

CITATIONS

Cases:

Bank v. *Kimble*, 76 Ind. 195	8
Florsheim Bros. Co. v. *United States*, 280 U. S. 453	10
Parchen v. *Chessman*, 49 Mont. 326	8
Russell v. *United States*, 278 U. S. 177	7
Sanger v. *Nightingale*, 122 U. S. 176	8
Stange v. *United States*, 68 C. Cls. 395; No. 23, October Term, 1930	10

Statutes:

Revenue act of 1921, c. 136, section 250 (d), 42 Stat. 227, Section 278 (e) 265	13
Revenue act of 1924, c. 234, section 278 (d) 43 Stat. 253, 299, 300	14
Revenue act of 1926, c. 27, section 278 (c) 44 Stat. 9, 58, 59	14
Revenue act of 1928, c. 852, section 506, 45 Stat. 791, 870	15

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v.

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 46–50) is reported in 10 B. T. A. 553, and the opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R. 71–79) sustaining the determination of the Board is reported in 35 F. (2d) 620.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Eighth Circuit was entered October 28, 1929. (R. 79.) A petition for rehearing was filed December 21, 1929, and denied

January 9, 1930. (R. 80.) The petition for the writ of certiorari was filed March 31, 1930 (R. 82), and was granted, with limitations, on May 5, 1930 (R. 81), 281 U. S. 713. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a waiver of the statutory period of limitation for assessment of taxes for 1917 was valid, although executed prior to the enactment of Section 250 (d) of the Revenue Act of 1921, which contained the first statutory provision for such waivers.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra,* pages 13–16.

STATEMENT

The order of this Court granting the writ of certiorari in this cause limited the briefs and argument to "questions concerning the validity and effect of the waivers." In the petition for certiorari the petitioner abandons all issues relating to the year 1918 (p. 6). Therefore, in this brief the respondent will discuss only the validity and effect of the waivers as affecting the assessment and collection of taxes for the year 1917.

The taxpayer filed an income and profits tax return for the year 1917 on March 30, 1918. (R. 40.) On February 5, 1921, he executed the following instrument:

Waiver (*Individual*)

I, Friend M. Aiken, in consideration of the assurance given me by officials in the Income Tax Unit of the Bureau of Internal Revenue that my liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917, on my net income received from all sources in said year, shall not be determined except after deliberate intensive, and thorough consideration, hereby waive any and all statutory limitations as to the time within which assessments based upon such liability may be entered. It is understood, however, that I do not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against me for said year by the officials of the Income Tax Unit.

FRIEND M. AIKEN,
Taxpayer.

(Signed) By E. F. BLAISE,
Attorney-in-Fact.

This instrument was filed by the taxpayer on February 7, 1921 (R. 41), and was approved by the Commissioner of Internal Revenue on November 29, 1922 (R. 41). This waiver expired on April 1, 1924, under a ruling promulgated by the Commissioner of Internal Revenue on April 11, 1923, and known as Mimeograph 3085 (C. B. II–1, p. 174), reading in part as follows:

> Inasmuch as there are many waivers on file signed by taxpayers containing no limitation as to the time in which assessments for 1917 may be made, all such unlimited waivers will be held to expire April 1, 1924.

On November 23, 1921, the Revenue Act of 1921 was enacted. Section 250(d), *infra*, p. 13, provided that taxes for 1917 be assessed within five years after the return was filed. In the instant case this five-year period expired on March 30, 1923.

On March 3, 1924, the taxpayer executed the following instrument, which was thereafter accepted and executed by the Commissioner of Internal Revenue (R. 41):

> MARCH 3, 1924.
>
> INCOME AND PROFITS TAX WAIVER
>
> In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Friend M. Aiken, of Tulsa, Oklahoma, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment, and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said individual for the years 1917 and 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August

5, 1909. This waiver is in effect from the date it is signed by the taxpayer, and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made for the year or years mentioned.

(Signed) FRIEND M. AIKEN,
Taxpayer.

(Signed) By D. H. BLAIR,
Commissioner.

On March 12, 1925, the Commissioner made a jeopardy assessment against the taxpayer for the year 1917 in the amount of $70,740.88. (R. 43.) Within ten days after the date of this assessment the taxpayer filed with the collector a claim in abatement. (R. 43.)

On October 7, 1926, the Commissioner advised the taxpayer of a determination on his claim for abatement of his tax liability for the year 1917, disclosing an overassessment of $19,126.79. (R. 44.) This reduced the jeopardy assessment by that amount and resulted in a deficiency of $51,614.09.

From this determination the taxpayer appealed to the Board of Tax Appeals on November 25, 1926. (R. 45.) The Board decided against the taxpayer. (R. 38.) The Circuit Court of Appeals for the Eighth Circuit affirmed the decision of the Board. (R. 71.)

Assessment of the taxpayer's 1917 taxes would have been barred on March 30, 1923, five years from the date of the return, had not the period for assessment been extended by the first waiver, executed on February 5, 1921. (R. 40). This waiver, though unlimited in its language, expired on April 1, 1924, under a ruling of the Commissioner. If this first waiver was valid and applicable, the time for assessment had not expired when a second waiver was executed on March 3, 1924. (R. 41.) This second waiver by its express terms was to remain in effect "for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be made * * *." Consequently, this waiver expired on April 1, 1925, if the first waiver was valid, and extended the period for assessment until after the time when the jeopardy assessment was made, March 12, 1925. If the first waiver was invalid, the second waiver expired on March 30, 1924, and does not cover the assessment.

If the jeopardy assessment of March 12, 1925, was valid, the tax may still be collected. The waiver of March 3, 1924, extended the time for collection, we contend, to April 1, 1925. On June 2, 1924, the Revenue Act of 1924 was passed. Section 278 (d) provided that where the assessment of any tax is made within the period prescribed, collection

may be made within six years after the assessment. Section 278 (e) has no application, as the period for collection was not barred and the assessment had not been made at the time of the passage of the Act. Cf. *Russell* v. *United States,* 278 U. S. 177. The existing law allows collection within six years after the assessment. Section 278 (d) of the Revenue Act of 1926, as amended by Section 506 of the Revenue Act of 1928. (*Infra,* pp. 14–15.)

The only question in the instant case involves the effect of the waivers dated February 5, 1921, and March 3, 1924, in extending the period for assessment. By its order of May 5, 1930, 281 U. S. 713, this Court limited the argument in this case to "the questions concerning the validity and effect of the waivers." (R. 82.)

SUMMARY OF ARGUMENT

The first waiver of February 5, 1921, was valid although executed prior to the enactment of Section 250 (d) of the Revenue Act of 1921, which contained the first statutory provision for such waivers. This section defined and perhaps slightly restricted the common-law right to waive the statute of limitations. The waiver was a valid exercise of this common-law right. Its terms are broad enough to include the taxes here in question and to apply to limitations which might be imposed by future statutes.

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ARGUMENT

The taxpayer's return for the year 1917 was filed March 30, 1918. Under date of February 5, 1921, the taxpayer executed a waiver of all statutory limitations on the time for assessment of the 1917 taxes. The taxpayer obviously intended to extend by this general waiver the period for the assessment of the 1917 tax.

There is no weight to the contention that this waiver is invalid because executed prior to the enactment of the Revenue Act of 1921, which first provided for waivers. It may be true, as the petitioner contends, that the language of Section 250 (d) of that Act refers to consents given after the enactment of the Act. But this first waiver is valid apart from statutory authorization for assesment waivers. It can not seriously be disputed that anyone has the common-law right to waive any statute of limitations enacted for his benefit. Any beneficiary under such a statute could avail himself of it or waive it. *Sanger* v. *Nightingale*, 122 U. S. 176; *Bank* v. *Kimble*, 76 Ind. 195; *Parchen* v. *Chessman*, 49 Mont. 326. The plea of the statute of limitations is a personal privilege which may be availed of or not, as the beneficiary chooses. *Sanger* v. *Nightingale, supra.*

There is nothing in Section 250 (d) of the Revenue Act of 1921 to indicate that Congress intended to create a new right of waiver of the bar of the statute of limitations. It merely defines and slightly restricts existing rights. It provides that

the amount of income, excess-profits, or war-profits taxes due under any return made under any prior Acts shall be determined and assessed within five years after the return was filed—

> unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax.

This language used is not reasonably susceptible of the interpretation that Congress was conferring upon either the taxpayer or the Commissioner of Internal Revenue any new authority. Certainly an Act of Congress was not necessary to permit a taxpayer to waive a statute of limitations and pay to his sovereign a tax justly and morally due. The better reasoning supports the contention advanced here by the Government that Congress, in the enactment of Section 250 (d) of the Revenue Act of 1921, intended only to sanction and define by statute the application of common-law principles of waivers. Under common-law principles there was no requirement that the Commissioner of Internal Revenue consent to the waiver, and the approval of the Commissioner on November 29, 1922, of the first waiver in the instant case was not needed. That this approval was made after the enactment of the Revenue Act of 1921 is of no significance. All that was necessary to constitute a valid waiver was that the taxpayer waive the statute of limitations. Such waiver was not necessarily required to be in writing but might have been oral. Section 250 (d) first specified the form required for a valid waiver and

made the written consent of the Commissioner of Internal Revenue a vital factor. See *Florsheim Bros. Co.* v. *United States,* 280 U. S. 453, 466–467.

The language of the Court of Claims in the case of *Stange* v. *United States,* 68 C. Cls. 395, now before this Court on a writ of certiorari (Docket No. 23) appears to construe the language used by Congress in a reasonable and logical manner. The court said, in part (p. 412):

> In the absence of a statutory provision either before or after the running of the statute of limitations, the taxpayer could, by a mere oral statement, waive the running of the statute. * * * The reason for having the commissioner sign the waiver had, in our opinion, nothing to do with its validity. * * * Congress did not intend that the Government should be bound in any way by the acceptance of waivers made by numerous collectors and revenue agents scattered all over the country but only in case the agreement was signed by the Commissioner of Internal Revenue. It was necessary for the orderly conduct of the Government's business that the commissioner should have full knowledge of the action taken. In this we find abundant reason for the requirement of the signature of the officer and, as we think, the only reason why it was required.

The petitioner, on page 15 of her brief, contends that the waiver of February 5, 1921, if valid, did not operate to extend the time for assessment of

war-profits taxes, but only of income taxes. She asserts that the language of the waiver, "all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress, approved October 3, 1917," does not refer to profits taxes. But the only statute approved on October 3, 1917, was Chapter 63, "An Act To provide revenue to defray war expenses, and for other purposes." This Revenue Act of 1917 was a separate Act from the Revenue Act of 1916, but a part of it, Title XII of the 1917 Act, consists of many amendments to that Act of September 8, 1916. It seems clear that the waiver covered profits taxes as well as income taxes.

The petitioner also argues that the waiver was not intended to waive limitations under subsequent statutes. The waiver was, by its express language, of "any and all statutory limitations" upon assessment of 1917 taxes. At the time of the execution of the waiver, the 1917 taxes had not been assessed and the Revenue Act of 1921 was soon to be enacted. We submit that the waiver was intended to cover an assessment to be made under future statutory provisions and that its language is indicative of this purpose.

Before the expiration of this first waiver on April 1, 1924, a second waiver was executed extending the period for assessment until April 1, 1925. Before the expiration of the period for assessment as extended by this second waiver, a jeopardy assessment was made on March 12, 1925. This

assessment was made "within the period of limitation properly applicable thereto," and under Section 278 (d) of the Revenue Act of 1926, as amended by Section 506 of the Revenue Act of 1928, *infra*, pages 15–16, collection may be had within six years after the assessment. Consequently collection is not barred until March 12, 1931, six years from the date of the jeopardy assessment.

CONCLUSION

It is respectfully submitted that the decision of the court below is correct and should be affirmed.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
JOSEPH H. SHEPPARD,
BRADLEY B. GILMAN,
Attorneys.

NOVEMBER, 1930.

APPENDIX

STATUTES INVOLVED

Section 250 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part:

> SEC. 250. * * * (d) The amount of income, excess-profits, or war-profits taxes due under any return made under this Act for the taxable year 1921 or succeeding taxable years shall be determined and assessed by the Commissioner within four years after the return was filed, and the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, or under section 38 of the Act entitled "An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," approved August 5, 1909, shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, or of any taxes due under section 38 of such Act of August 5, 1909, shall be begun, after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act: * * *

Section 278 (d) and (e) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, provides:

> (d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court, begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. (U. S. C., Title 26, Sec. 1061.)
>
> (e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act. (U. S. C., Title 26, Sec. 1062.) (*Russell* v. *United States*, 278 U. S. 181.)

Section 278 (c) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 58, 59, provides:

> Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. (U. S. C. App., Title 26, Sec. 1060.)

Section 506 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870, provides, in part:

> SEC. 506. *Waivers after expiration of period of limitation.*—(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:
>
> * * * * *
>
> "(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."
>
> (b) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:
>
> "(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms

if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(c) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed.

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